No. 97-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AURELIA DAVIS, as next friend of LASHONDA D.,

Petitioner,

vs.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STUDENTS FOR INDIVIDUAL LIBERTY AND STUDENT ASSOCIATION FOR FREEDOM OF EXPRESSION IN SUPPORT OF RESPONDENTS

JAMES A. MOODY
Attorney for Amici Curiae
1101 30th Street, N.W.
Suite 300
Washington, DC 20006
(202) 298-4766

42 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. APPLYING HOSTILE ENVIRONMENT REGULATIONS TO STUDENT SPEECH WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS 3

A. The Courts Have Repeatedly Struck Down Hostile-Environment Harassment Codes on First Amendment Grounds . . 3

B. The Office for Civil Rights Interprets Title IX to Require Speech Codes, Including Restrictions on Core Political Speech 6

C. Hostile Environment Regulations Have Frequently Been Used to Silence Dissent on College Campuses. 11

D. Applying Hostile Environment Regulations to College Campuses Under Title IX Would Require Broad Restrictions on Core Political Speech . . 15

II. THIS COURT SHOULD CONSTRUE TITLE IX NARROWLY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS. 22

III. SERIOUS CONSTITUTIONAL QUESTIONS CAN BE AVOIDED BY CONSTRUING TITLE IX AS MODELLED ON THE EQUAL PROTECTION CLAUSE, WHICH DOES NOT REACH STUDENT SPEECH OR CONDUCT 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) 19

Blum v. Yaretsky, 457 U.S. 991 (1982) 25

Brown Transport Corp. v. Pennsylvania Human Relations Commission, 578 A.2d 555 (Pa. Commw. 1990) 16

Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted, opinion vacated*, Feb. 5, 1998 25

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1962) 25

Cannon v. University of Chicago, 441 U.S. 677 (1979) 24

Cardin v. Via Tropical Fruits, 1993 U.S. Dist. LEXIS 16302 (S.D. Fla. July 9, 1993) 20

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 22

Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996) 28

Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 20, 29

Corry v. The Leland Stanford Junior University, Case No. 740309 (Cal. Super. Ct., Santa Clara Cty.) 10

Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995) 3, 4

Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997), *cert. granted in part*, 119 S.Ct. 29 (1997). 26

DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995) 16

Doe v. Londonderry School District, 970 F. Supp. 64 (D. N.H. 1997) 26

Doe v. Taylor Independent School Dist., 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993) 28

Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1997) 25

Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989) 4

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 (1988) 22

Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) 24

Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998) 23, 28

Haney v. University of Illinois, 1994 WL 880339 (Ill. Hum. Rts. Comm.) . . . 23

Healy v. James, 408 U.S. 169 (1971) 19

Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) 8

Iota Xi Chapter of Sigma Chi Fraternity, 993 F.2d 386 (4th Cir. 1993) 4

Joseph v. Publix Supermarkets, Inc., 983 F. Supp. 1431 (S.D. Fla. 1997) 16, 20

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 28

Louisiana Debating and Literary Association v. New Orleans, 42 F.3d 1483 (5th Cir. 1995) 21

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 29

Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022 (9th Cir. 1998) 15, 23

Moose Lodge No. 107 v. Irvis,
407 U.S. 163 (1972) 26

N.L.R.B. v. Catholic Bishop of Chicago,
440 U.S. 490 (1979) 22

NAACP v. Button,
371 U.S. 415 (1963) 19

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 9

Oncale v. Sundowner Offshore Services,
118 S.Ct. 998 (1998) 24

Personnel Administrator v. Feeney,
442 U.S. 256 (1979) 26

Podberesky v. Kirwan, 838 F. Supp. 1075
(D. Md. 1993), *rev'd on other grounds*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) 16

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 19

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 24, 28

Richardson v. CHI Institute, No.
96-CV-7524 (E.D. Pa. Jan. 14, 1998) 18

Rosenberger v. Rector & Vistors of the University of Virginia,
515 U.S. 819 (1995) 19

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,
483 U.S. 522 (1987) 25

Schwapp v. Avon,
118 F.3d 106 (2d Cir. 1997) 17

Silva v. Univ. of New Hampshire,
888 F. Supp. 293 (D.N.H. 1994) 28

Sparks v. Pilot Freight Carriers, Inc.,
830 F.2d 1554 (11th Cir. 1987) 21

The Civil Rights Cases, 109 U.S. 3 (1883) 25

Thonen v. Jenkins,
491 F.2d 722 (4th Cir. 1973) 19

United States v. Fordice,
505 U.S. 717 (1992) 24

United Steelworkers v. Weber,
443 U.S. 193 (1979) 24

UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin System,
774 F.Supp. 1163 (E.D. Wis. 1991) . . 3, 13, 26

Wilson v. Taylor,
733 F.2d 1539 (11th Cir. 1984) 21

Yniguez v. Arizonans for Official English,
69 F.3d 920 (9th Cir. 1995), *vacated*, *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997) 29

CONSTITUTIONS, STATUTES, AND RULES

20 U.S.C. § 1681 . . . . . 2, 7, 8, 10, 22, 23, 27-29

42 U.S.C. § 2000d 7, 8, 10, 24

42 U.S.C. § 2000e 3, 23, 24

Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (March 10, 1994). 7

Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997) 7

U.S. Const. amend. I 1-3, 5, 11, 13, 19, 21, 22

U.S. Const. amend. XIV, § 1 . . . . . 2, 26, 28, 29

MISCELLANEOUS

Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 106 Ed. Law Rep. 519 (1996) 4

Balmain, *Readers: This Column Might Offend You, Orange County Register*, Dec. 7,

1994, Metro 1 12

Big Sister Is Watching, Sacramento Bee, Sept. 27, 1994, at B6 7

Craddock, *Constitutional Law, 'Words That Injure, Laws That Silence:' Campus Hate Speech Codes and the Threat to American Education*, 22 Fla. St. U. L. Rev. 1047 (1995) 5, 6

Ek, *College Drops Harassment Ban*, S.F. Chron., Dec. 4, 1993, at A18 12

Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687 (1997) 17, 18

Faulkner, *A Rose for Emily* 15

Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225 (1992) 5

Gates, *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, New Republic (Sept. 20 & 27, 1993) 15

Grey, *How to Write a Speech Code Without Really Trying*, 29 U.C. Davis. L. Rev. 891 (1996) 10

Hentoff, *Sexually Harassed by Francisco Goya*, Wash. Post, Dec. 27, 1991, A21 12

Jaffe, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses*, 80 Minn. L. Rev. 979 (1996) 16

Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 Cal. L. Rev. 637 (1995) 16, 18

Kors & Silverglate, *The Shadow University* (1998) 5, 11

Lewin, New York Times News Service, *Single Sex-Bytes*, Chicago Tribune, Oct. 16, 1994, at 5 7

Lewis, New York Times News Service, *Speech Code Fit For Orwell*, Dallas Morning News, Nov. 30, 1995, at 35A . . . 7, 9

McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 Stan. L. Rev. 523 (1998) 18

Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. Va. L. Rev. 511 (1993) 5

Nevermore for Poe Film, Lawsuit Says, S.F. Examiner, Aug. 30, 1994, at A2 12

People for the American Way, *Artistic Freedom Under Attack* (1994) 12

Robbins, *When Two Liberal Values Collide in an Era of Political Correctness: First Amendment Protection as a Check on Speech-Based Title VII Hostile -Environment Claims*, 47 Baylor L. Rev. 789 (1995) 16

Savage, *Forbidden Words on Campus*, L.A. Times, Feb. 12, 1991, at A1 13

Schools Liable for Kids' Racial Slurs, Nat'l L.J., Nov. 2, 1998, at A10 15

Smolla, *Smolla & Nimmer on Freedom of Speech* (1997) 5

Taylor, *A Clintonite Threat to Free Speech*, May 9, 1994, Legal Times, Opinion and Commentary, p.2 8

Twain, *Huckleberry Finn* 15

Volokh, *Freedom of Speech in Cyberspace From the Listerner's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. Chi. Legal F. 377 (1996) 5, 16

Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict*, 85 Geo. L. J. 627 (1995) 16, 18

INTEREST OF AMICI CURIAE

Students for Individual Liberty ("SIL") was founded in 1987 to promote civil liberties. SIL seeks to educate students about their constitutional rights, bringing prominent lawyers, legal scholars, and other academics to the University of Virginia to lecture. Above all else, SIL opposes censorship. SIL members opposed the student government's 1989 attempt to defund the *Virginia Advocate*, the University of Virginia's only conservative publication, and a speech code proposed by the student government in 1988. In 1990, SIL members opposed another speech code which would have banned speech that created a "hostile environment" for members of "historically-disadvantaged" groups.

The Student Association for Freedom of Expression was founded in 1991 at the Massachusetts Institute of Technology. It publicizes abuses of academic freedom on its websites, assists student groups at other universities in opposing censorship, and sponsored a 1992 referendum at M.I.T. in which students voted for modifications to M.I.-T.'s harassment code to protect freedom of speech.

Amici have a strong interest in the outcome of this case because the Court's decision will have an impact on thousands of students and student publications whose speech may be deemed to contribute to a "hostile environment" on campus.[1] Petitioner and respondents have consented to the filing of this brief by letters filed with the Clerk of the Court.

---

[1] No party or its counsel authored this brief in whole or in part or made any monetary contribution. Amici's members paid for this brief.

SUMMARY OF ARGUMENT

Title IX must not be construed to impose on educational institutions the duty to prevent student speech that contributes to a "hostile learning environment." Such an interpretation would raise serious First Amendment questions as applied to college students' speech. Moreover, Title IX can reasonably be interpreted more narrowly to avoid those constitutional questions.

First, Title IX is modelled on the Equal Protection Clause, which regulates only the conduct of the institution and its employees, and does not require it to regulate the conduct of its students or third parties. Thus, it is reasonable to construe Title IX as not holding institutions liable for "peer harassment," regardless of whether the harassment takes the form of speech or conduct.

Second, it is a fundamental canon of statutory interpretation that statutes must be interpreted narrowly to avoid serious constitutional questions. This canon overcomes the competing canon that agency interpretations of statutes are given deference by this Court. Thus, if there are serious constitutional questions over whether student speech that contributes to a hostile environment can be restricted, Title IX must be construed narrowly so as not to reach student speech, even if the Office for Civil Rights advocates a broader interpretation.

Third, restricting student speech that contributes to a "hostile learning environment" raises serious constitutional questions in the higher-education setting. Hostile-environment harassment codes at state colleges and universities have been repeatedly struck down by the lower courts. *E.g.*, *Dambrot v. Central Michigan University*, 55

F.3d 1177 (6th Cir. 1995); *UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin System*, 774 F.Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

ARGUMENT

I. APPLYING HOSTILE ENVIRONMENT REGULATIONS TO STUDENT SPEECH WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

A. The Courts Have Repeatedly Struck Down Hostile-Environment Harassment Codes on First Amendment Grounds.

In case after case, the lower courts have overturned college "hostile environment" harassment policies as unconstitutional as applied to students. *UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin System*, 774 F.Supp. 1163, 1165 (E.D. Wis. 1991), overturned a harassment policy banning "discriminatory comments" based on "race, sex, religion, color, creed, disability, sexual orientation," etc., that "intentionally . . . [c]reate an intimidating, hostile, or demeaning educational environment." The court rejected the argument that Title VII's restrictions on offensive workplace speech were appropriate for university students: "Title VII is only a statute, it cannot supersede the requirements of the First Amendment." *Id.* at 1177.

Similarly, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), struck down a racial harassment policy banning any "'physical, verbal, or non-verbal behavior that subjects an individual to an intimidating,

hostile or offensive educational, employment, or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.'" *Id.* at 1182. The Sixth Circuit found that this harassment policy was unconstitutionally vague, overbroad, and viewpoint-based, noting that its plain language applied to all speech, "regardless of political value," that created a hostile environment. *Id.* at 1183.

Other courts have also confronted speech restrictions designed to prevent the development of "hostile environments." The Fourth Circuit overturned a university's discipline of a fraternity for a skit that allegedly contributed to a "hostile and distracting learning environment" for blacks and women, *Iota Xi Chapter of Sigma Chi Fraternity*, 993 F.2d 386, 388, 390 (4th Cir. 1993), while a trial court overturned the University of Michigan's hostile-environment sexual and racial harassment policies in a challenge by a psychology graduate student who showed he might be disciplined for discussing sex-based differences between men and women. *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989).

Legal scholars have agreed that there is enough difference between workplace settings and college campuses that "hostile environment" regulations would unconstitutionally infringe college students' rights if applied to their speech. *E.g.*, Thomas Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 106 Ed. Law Rep. 519, 535 (1996)("On a college campus, moreover, public officials may not discipline a student for verbal harassment

unless the offensive verbiage fits within the 'fighting words' exception"), *citing UWM Post, supra*; 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech*, § 17.24 at 17-34-35 (1997)("If the First Amendment permits the government to mandate a 'racism-free' workplace, why shouldn't it permit government to mandate a 'racism-free' campus? . . . [Because] [t]he university, by contrast, should be understood *not* as a special setting such as the workplace, but rather as the sort of 'open marketplace' in which content-based regulation of speech is normally prohibited")(discussing *UWM Post, supra*); Jeanne M. Craddock, *Constitutional Law, "Words That Injure, Laws That Silence:" Campus Hate Speech Codes and the Threat to American Education*, 22 Fla. St. U. L. Rev. 1047, 1049, 1089 (1995); Eugene Volokh, *Freedom of Speech in Cyberspace From the Listeners' Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. Chi. Legal F. 377, 436 (1996); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 247-48 (1992); Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. Va. L. Rev. 511, 537-38, 547-48 (1993); Alan Kors & Harvey Silverglate, *The Shadow University* 89 (1998)("authoritative First Amendment case law . . . - makes it highly unlikely that Title VII proscriptions of offensive speech would be applied to college and university students under Title IX").

"When Constitutional arguments do not succeed, hate speech code advocates look to Title VII of the Civil Rights Act of 1964 regulating harassment in the workplace. Advocates claim that offensive speech creates a hostile environment for students subject to hate speech. But the university setting is different from the workplace.

Workplace speech is generally limited to what is necessary to get the job done, and restrictions are permitted on speech that gets in the way of the job. University education, on the other hand, requires that students confront and engage in speech that is often offensive and disagreeable. The heart of undergraduate and graduate educations takes place in wide open debate." Jeanne M. Craddock, *Constitutional Law, "Words That Injure, Laws That Silence:" Campus Hate Speech Codes and the Threat to American Education*, 22 Fla. St. U. L. Rev. 1047, 1049 (1995).[2]

B. The Office for Civil Rights Interprets Title IX to Require Speech Codes, Including Restrictions on Core Political Speech.

The Office for Civil Rights has interpreted its

---

[2] The First Amendment may also limit high-school harassment rules. While this Court has given public high schools the *freedom* to restrict patently offensive speech, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), it has never held that they may be *compelled* by federal law to restrict such speech, leaving the states free to protect such speech in their state constitutions. *E.g., Pyle v. South Hadley School Committee*, 423 Mass. 283, 667 N.E.2d 869 (1996)(Massachusetts law protects speech not protected by First Amendment under *Bethel*); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995)(school is not obligated by federal law to restrict such speech). Moreover, the mere fact that schools are allowed to restrict patently offensive speech in general, does not mean that the federal government can compel them through Title IX to single out racially and sexually offensive speech for prohibition. *See Pyle v. South Hadley School Committee*, 861 F. Supp. 157, 170-74 (D. Mass. 1994)(voiding sex/race harassment policy as unconstitutional viewpoint discrimination; while school could ban *all* lewd speech, it could not constitutionally single out only racially or sexually offensive speech for prohibition), *citing R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

regulations prohibiting peer-on-peer harassment under Title IX and Title VI as requiring broad speech codes banning even individual instances of racially or sexually offensive speech. *See Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12045-46 (Mar. 13, 1997)(Title IX regulations); *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448 (March 10, 1994). For example, in 1994, it found the Santa Rosa Junior College liable for sexual harassment because it failed to prevent the former boyfriend of a campus women's rights activist from making derogatory remarks about her in private messages he sent to another male student in the college's electronic bulletin board system. *Big Sister Is Watching*, Sacramento Bee, September 27, 1994, at B6; Tamar Lewin, New York Times News Service, *Single Sex-Bytes*, Chicago Tribune, Oct. 16, 1994, at 5. In exchange for not cutting off the College's federal funds, OCR demanded that it adopt a speech code banning "comments that harass, denigrate, or show hostility toward a person or group based on sex, race, or color, including slurs, negative stereotypes, jokes, or pranks." *Lewin, supra*; *accord Big Sister Is Watching*. No exception was made for political beliefs which "denigrate" groups, such as arguing that girls are smarter than boys, or that boys have greater mathematical or spatial reasoning capabilities than girls. *Cf. Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989)(striking hostile-environment sexual harassment policy challenged by graduate student who wished to discuss inherent gender-based differences); Anthony Lewis, New York Times News Service, *Speech Code Fit For Orwell*, Dallas Morning News, Nov. 30, 1995, at 35A (noting that criticism of unmarried mothers might be deemed sexually harassing).

Similarly, OCR has indicated that controversial political opinions on subjects such as affirmative action may constitute "peer harassment" under Title VI and Title IX. Stuart Taylor, senior columnist for the *Legal Times*, asked Judith Winston, the general counsel of the Education Department with oversight over OCR, whether a hypothetical heated discussion of affirmative action based on the landmark reverse discrimination suit *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), would violate Title VI's prohibition on peer harassment. Taylor, *A Clintonite Threat to Free Speech*, May 9, 1994, Legal Times, Opinion and Commentary, p.2.[3] Winston responded that the guidelines did not enable her to "com[e] to any conclusion whether that

[3] Stuart Taylor framed the discussion as follows:

> Imagine a heated discussion of affirmative action in a constitutional law class at, say, the University of Texas. A white student complains that the Supreme Court has rigged the system so that her brother was denied admission to the law school while "less qualified blacks" were admitted. A black student calls her a "racist liar." As the debate heats up, the professor says: "Look, reasonable people disagree about this, but we should recognize two facts: First, until a few decades ago, black people were excluded altogether from this law school and subjected to shameful discrimination in every area of life. Second, according to records on file in a pending lawsuit, the vast majority of our current minority students were admitted ahead of whites with higher grades and test scores, on the basis of racial preference." This prompts a black student to shout loudly, "Are you saying we're not good enough to be here?" The professor says no; the white student growls, "You shouldn't have gotten in on a quota, over my brother."

is the type of incident that would be found to be racially discriminatory or racial harassment under Title VI." *Id.*

"Whether it is constitutional for a public college or graduate school to use race or national origin in its admissions process is an issue of great national importance." *Texas v. Hopwood*, 518 U.S. 1033 (1996)(Ginsburg, J., joined by Souter, J., commenting on the denial of the petition for certiorari). Yet OCR's rules cast doubt on whether students at the University of Texas -- the very school whose policies gave rise to the nationally-debated *Hopwood* case -- would even be allowed to discuss that case in vigorous terms, even though the First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Podberesky*, 838 F. Supp. at 1093-94 (finding "hostile racial" environment based partly on school paper's "commentary and letters highlighting . . . preferential treatment" of black students).

University officials widely understand that OCR's peer harassment guidelines are designed to prevent offensive and unpopular viewpoints from being expressed. For example, "[t]he Chancellor of the [University of Massachusetts at] Amherst campus, David K. Scott, responded to criticism [of the university's proposed speech code] by suggesting that a code was required by federal Department of Education regulations." Anthony Lewis, New York Times News Service, *School Drafts Speech Code Fit for Orwell*, Dallas Morning News, Nov. 30, 1995, at 35A ("the federal regulations need revision. It is time to stop letting the elastic concept of a 'hostile environment' menace freedom of speech, at universities of all places").

Similarly, Stanford's hate-speech code was adopted in order to comply with the "peer harassment" requirements of Titles VI and IX as construed by OCR. Thomas C. Grey, *How to Write a Speech Code Without Really Trying*, 29 U.C. Davis. L. Rev. 891, 907 (1996). Stanford's harassment policy echoed OCR's proposed speech code for Santa Rosa Junior College, in that it prohibited even single instances of offensive speech, although it took a more moderate position than OCR by punishing only offensive epithets and "personal vilification." *See id.* As the drafter of Stanford's speech code observed, individual instances of offensive speech must be punished to comply with Title IX's peer harassment provisions, since "a hostile environment can arise from single acts of discrimination on the part of many different individuals. . .it is necessary to prevent the individual actions that, when added up, amount to" a hostile environment, including individual instances of offensive speech. *Id.; see also Richardson v. CHI Institute*, No. 96-CV-7524 (E.D. Pa. Jan. 14, 1998), Docket Document No. 45 (awarding plaintiff $102,000 against institution of higher learning under Title IX because the institution failed to prevent its students from telling coarse sexual jokes that cumulatively developed into a hostile learning environment over time). Stanford's hate-speech code was later struck down under California law, which applies free speech guarantees even to private universities such as Stanford. *Corry v. The Leland Stanford Junior University*, Case No. 740309 (Cal. Super. Ct., Santa Clara Cty., Order on Preliminary Injunction, February 27, 1995)(voiding Stanford's harassment policy under California's Leonard Law).

Relying on OCR's guidelines, Kansas' Attorney General has issued an opinion declaring that campus speech codes are not only permissible, but necessary to

comply with Title IX. Kan. Atty. Gen. Op. No. 96-1, 1996 WL 46866 (Jan. 12, 1996), *citing* 59 Fed. Reg. 11,452 (1994), OCR Cas. No. 05-90-2024. According to the Attorney General, colleges must restrict a wide range of speech, such as "perpetuation of sex-based stereotypes," to avoid a "hostile environment." *Id.* The Attorney General attacked the case that overturned the University of Michigan speech code as being in conflict with OCR's construction of Title IX. *Id., citing Doe v. Univ. of Michigan*, 721 F. Supp. at 867, 59 Fed. Reg. 11449.

Although campus speech codes were once typically limited to narrow classes of arguably unprotected speech, such as racial epithets, they have now become much broader in their reach under the influence of federal hostile environment regulations, encompassing even unintentionally offensive academic dialogue. *E.g.*, Alan Kors & Harvey Silverglate, *The Shadow University* 86-96 (1998)(discussing application of campus harassment policies). The primary justification given for campus speech codes across America today is the need to prevent a hostile learning environment. *Id.* at 86.

C. Hostile Environment Regulations Have Frequently Been Used to Silence Dissent on College Campuses.

Judges and legal scholars are right to be concerned over the First Amendment implications of extending harassment law to college students' speech. Speech on many important political and social issues, such as affirmative action and feminism, is perceived by some as contributing to a hostile learning environment. Hostile environment harassment charges have had a grave chilling effect on academic, artistic, and press freedoms on campus.

1. *Academic Freedom*. -- Professor Joseph Conlin, an award-winning historian at Chico State University, was found to have engaged in hostile-environment racial harassment for stating that under Chico State's racial hiring goals, "little more is required of affirmative action faculty than that they show evidence of a majority of vital life signs." Richard Ek, *College Drops Harassment Ban*, S.F. Chron., Dec. 4, 1993, at A18.

2. *Artistic Freedom*. -- Hostile-environment sexual harassment prohibitions have had a chilling effect on the study of the arts, forcing arts instructors to censor their curriculum. Melissa Balmain, *Readers: This Column Might Offend You, Orange County Register*, Dec. 7, 1994, Metro 1. The drawing of nude models has diminished; photos of Michelangelo's "David" are shown from the waist up to avoid litigation; and a professor at California State University at Northridge is said to have been fired for asking students to make nude sketches. *Id*. A student sued for sexual harassment after being shown a movie based on Edgar Allen Poe's classic short story "The Pit and the Pendulum," which she perceived as sexually humiliating. *Nevermore for Poe Film, Lawsuit Says*, S.F. Examiner, Aug. 30, 1994, at A2.

Hostile-environment regulations have repeatedly been used to censor the arts. *E.g.*, 2 People for the American Way, *Artistic Freedom Under Attack* 7 (statistics), 50, 92, 111, 121, 156, 197, 208, 214 (1994). For example, an exhibition on loan from the Museum of Modern Art, *Nudes*, was removed from Colgate University's Picker Art Gallery after administrators claimed it contributed to a hostile environment. *Id.* at 156. Classical nude paintings are among the most common targets of this form of censorship. *E.g.*, Nat Hentoff, *Sexually Harassed by*

Francisco Goya, Wash. Post, Dec. 27, 1991, at A21 (painting removed from classroom where it hung for years after professor said it harassed her).

3. *Freedom of the Press*. -- Campus newspapers have been subjected to disciplinary action for discussing controversial issues such as affirmative action, feminism, homosexuality, and the death penalty. For example, college administrators at the University of Lowell forced the editors of the *Connector*, the student newspaper, to stand trial for "creating a hostile environment on campus" after the editors ran an editorial cartoon which depicted a big-bellied death penalty advocate with the caption "none of his friends are young black males," beside an animal rights activist with the caption "some of my best friends are laboratory rats." David G. Savage, *Forbidden Words on Campus*, L.A. Times, Feb. 12, 1991, at A1. Despite the liberal content of the cartoon, which derided the death penalty on the basis of its disparate impact on young black males, students filed charges against the paper for its "racial insensitivity" for what they perceived as its having "very boldly compared young black males to laboratory animals." *Id.* The editors eventually faced disciplinary sanctions including probation, 30 hours of community service, and removal from the newspaper's staff. *Id.*

Fortunately, until recently, the "harassment" rationale for restricting speech on college campuses was rejected repeatedly by the courts, at least insofar as it applies to students. *E.g., UWM Post, supra*. The recognition that the First Amendment protects artistic, academic, and press freedoms has given University administrators reason to pause before restricting "harassing" speech. *E.g.*, David G. Savage, *Forbidden Words on Campus*, L.A. Times, Feb. 12, 1991, at A1 (sanctions for the editors of the

Connector dropped after they threatened a First Amendment lawsuit).

The possibility that "hostile environment" lawsuits will be brought in part on the basis of speech on political or social issues with sexual or racial overtones is very real. The fact that speech may be reasoned and civilly expressed does not prevent it from being "hostile" or "offensive" to those who deeply disagree with it. As the head of Harvard's African-American Studies Program noted in arguing against Stanford's harassment policy on free-speech grounds, a black Stanford freshman would probably find a sharp, empirically-based criticism of Stanford's affirmative action policy to be more offensive than an epithet, contrasting these two statements:

> "LeVon, if you find yourself struggling in your classes here, you should realize that it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well intended, but given the fact that aptitude tests place African-Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly-misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide."
>
> "Out of my face, jungle bunny."

Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, New Republic 37, 45 (Sept. 20 & 27, 1993).

A recent case illustrates that important discussions of race and gender can be more offensive (and thus more likely to trigger a harassment lawsuit) than simple name-calling. *Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998). *Monteiro* involved a harassment suit based partly on a school district's use of two celebrated books (*Huckleberry Finn* and *A Rose for Emily*) which use the word "nigger" to illustrate the ugliness of racism and based partly on alleged name-calling by classmates using the word "nigger." What angered the plaintiff most was not the racist name-calling, but the school district's use of the racially offensive books. *Schools Liable for Kids' Racial Slurs*, Nat'l L.J., Nov. 2, 1998, at A10 (if school board hadn't "assigned that material" to plaintiff, "we wouldn't have sued").

D. Applying Hostile Environment Regulations to College Campuses Under Title IX Would Require Broad Restrictions on Core Political Speech.

Echoing Professor Gates, legal scholars have concluded that "hostile environment" harassment law does indeed restrict reasoned discussion in the same fashion as it restricts racial epithets. "Note what [Title VII's] definition [of harassment as speech that creates a hostile environment] does *not* require. It does not require that the speech consist of obscenity or fighting words or threats or other constitutionally unprotected statements. It does not require that the speech be profanity or pornography, which some have considered 'low value.' Under the definition,

it is eminently possible for political, religious, or social commentary, or 'legitimate' art, to be punished." Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict*, 85 Geo. L. J. 627, 629 (1995). Many commentators agree that harassment law reaches core political speech, and have concluded that it cannot constitutionally do so.[4]

Core religious speech, such as Bible verses on paychecks and religious articles in the company newsletter, can contribute to a hostile environment. *Brown Transport Corp. v. Pennsylvania Human Relations Commission*, 578 A.2d 555, 562 (Pa. Commw. 1990). Similarly, speech on important racial issues, such as affirmative action, can be very offensive to members of particular groups and thus contribute to a hostile environment. *Joseph v. Publix Supermarkets, Inc.*, 983 F. Supp. 1431, 1435 (S.D. Fla. 1997)(co-worker's assertion that plaintiff got her job because she was "a black woman" and that scholarship fund for blacks was "reverse discrimination" contributed to hostile environment); *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1093-94 (D. Md. 1993)(finding "hostile racial" environment sufficient to support blacks-only scholarship based largely on independent school newspaper's "racist letters to the editor and articles, commentary and letters highlighting black academic failure [and] preferential treatment" of black students), *rev'd on other grounds*, 38 F.3d 147, 154-55 (4th Cir. 1994)(finding that racially hostile environment could not support scholarship program where it was not traceable to the university's segregated past), *cert. denied*, 514 U.S. 1128 (1995); Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 723 (1997) ("criticizing real or perceived quotas, preferences, or affirmative action efforts based on race or gender are likely to offend some workers and may contribute to a discriminatory hostile environment," even though such speech is vital to the "democratic process" and thus should be "protected within the workplace.").

[4] *See, e.g.*, Jessica Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 Cal. L. Rev. 637, 637, 677 (1995); David Jaffe, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses*, 80 Minn. L. Rev. 979, 1007-08 (1996); Wayne Robbins, *When Two Liberal Values Collide in an Era of Political Correctness: First Amendment Protection as a Check on Speech-Based Title VII Hostile-Environment Claims*, 47 Baylor L. Rev. 789 (1995). Moreover, hostile-environment regulations are "content-based, viewpoint-discriminatory restrictions on speech." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir.), *cert. denied*, 516 U.S. 974 (1995); Volokh, *Harassment Law & Free Speech Doctrine*, http://www.law.ucla.edu/faculty/volokh/harass/SUBSTANC.HTM#96.

The chilling effect of hostile-environment regulations is aggravated by the fact that a hostile environment claim can be based largely on comments by a variety of different speakers that the plaintiff learns about second or thirdhand -- even comments uttered before he was even hired! *Schwapp v. Avon*, 118 F.3d 106, 111 (2d Cir. 1997)("The district court erred in failing to consider the eight additional incidents that did not occur in Schwapp's presence. . .includ[ing] one racially hostile comment made prior to Schwapp's employment."). In the university setting, this would mean that a student could sue based in part on what he read in a student newspaper. Moreover, if one student had a sexual discussion with another student in the privacy of the speaker's own dormitory room, and a third party learned about it, that third party could demand discipline of the speaker. And a university could not safely exempt any of these instances of speech

from discipline so as to create breathing space for freedom of speech, since a hostile environment may cumulatively develop over time from the comments of many different speakers, each of which is merely offensive, and none of which is *individually* severe enough to create a hostile work environment. *See Richardson v. CHI Institute*, No. 96-CV-7524 (E.D. Pa. Jan. 14, 1998), Docket Document No. 45 (awarding plaintiff $102,000 against institution of higher learning under Title IX because the university failed to prevent its many students from telling coarse sexual jokes that cumulatively developed into a hostile learning environment for the plaintiff); Daniel G. McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 Stan. L. Rev. 523, 554 (1998)(Under the harassment "guidance" promulgated by the Office for Civil Rights, "If each individual harasser acts within his First Amendment rights but the cumulative effect is severe and pervasive to the victim," the school is liable for "peer harassment").

Therefore, holding universities liable for "peer harassment" based on Title VII standards would effectively require them to discipline students for *any* instance of racially or sexually offensive speech, and to adopt "zero-tolerance" prohibitions against racist and sexist speech. *See* Jessica Karner, *Political Speech, Sexual Harassment, and a Captive Audience*, 83 Cal. L. Rev. 637, 658 (1995)("To avoid the possibility of liability, each offensive remark must be eliminated from the workplace"); *Volokh*, 85 Geo. L. J. at 638 ("The employer's only reliable protection is a zero-tolerance policy")(citing court cases and the advice of many management employment lawyers to their clients); Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 698 n.45 (1997). Such necessary means of avoiding liability for ha-

rassment would leave no breathing space for free speech on campus, and would violate this Court's rule that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedom." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Such a result is wholly unacceptable in colleges and universities, which are "peculiarly the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1971).[5] "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." *Rosenberger v. Rector & Vistors of the University of Virginia*, 515 U.S. 819, 836 (1995). Even racist and sexist speech is protected, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), and it is no more acceptable to ban racist and sexist speech on campus than it is in society as a whole. "[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community large." *Healy v. James*, 408 U.S. 169, 180 (1971); *accord Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973)(students' free speech rights "on college campuses are coextensive with those in the community at large")(citing *He-*

---

[5] *Cf.* Kenneth Jost, *Questionable Conduct: There Can Be A Fine Line Between Preventing Sexual Harassment and Punishing Protected Speech*, 80 ABA Journal 70, 74 (Nov. 1994)(quoting "Deborah Ellis of NOW [LDEF]" -- ironically, now an amicus for plaintiff in this case -- as saying that speech that creates a hostile work environment "can be banned on the job," because it "is a 'place for work, not a forum for the exchange of ideas,'" unlike college campuses).

aly).

Holding universities liable for the "harassing" speech of students would produce a legal anomaly, reducing students to second class status in terms of free speech rights. On the streets, Nazis could continue to march, *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), and pornographers could continue to peddle their wares. *Hudnut, supra*. Yet on a nearby college campus, students would not be permitted to insensitively criticize affirmative action, *see Joseph v. Publix Supermarkets, Inc.*, 983 F. Supp. at 1435 (S.D. Fla. 1997-), nor could they safely tell sexual jokes or discuss their private lives even in the privacy of their own dormitory rooms, since sexual humor and references are deemed inherently harassing by many courts. *E.g.*, *Dernovich v. City of Great Falls*, Mont. Hum. Rts. Comm'n No. 9401-006004 (Nov. 28, 1995)(finding hostile environment solely based on nonsexist off-color jokes distributed by plaintiff's female and male colleagues once or twice a month over several years, which constituted "sexual harassment" because they "offended [complainant] as a woman"); *Cardin v. Via Tropical Fruits*, 1993 U.S. Dist. LEXIS 163-02, at *24-25 & n.4 (S.D. Fla. July 9, 1993)("every incident" of sexual humor reported by plaintiff was harassment, even though many of the jokes and cartoons "depicted both men and women" and were not aimed at her); *Volokh, supra* (citing cases); http://www.law.ucla.edu/faculty/volokh/harass/breadth.thm (citing additional cases). Surely, this is not what Congress intended when it enacted Title IX.

Construing Title IX to reach the private conduct of students also raises serious privacy concerns. The courts have long treated commonplace forms of noncoercive

sexual behavior as probative of sexual harassment: "[M-]ost complaints of sexual harassment are based on actions which. . .may be permissible in some settings," and prohibiting what would be considered a "compliment" outside the workplace "is, in many cases, the whole point of the sexual harassment claim." *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.13 (11th Cir. 1987). Thus, applying Title IX to what students say and do in their apartments and dormitory rooms would effectively impose Title VII workplace norms on their private lives -- norms under which romantic overtures and sexual banter are generally presumed to be injurious. *E.g., Volokh, supra* (sexual banter); *Dernovich, supra* (sexual humor); *Cardin v. Via Tropical Fruits, supra* (same).[6] Such regulation would intrude deeply into aspects of students' private lives, such as their associational activities and dating relationships, which are protected by the First Amendment freedom of intimate association. *See, e.g., Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984)(dating); *Louisiana Debating and Literary Association v. New Orleans*, 42 F.3d 1483 (5th Cir. 1995)(antidiscrimination ordinance which authorized investigations of the activities of private clubs violated freedom of intimate association).

---

[6] The fact that hostile-environment regulations require that behavior be "unwelcome" to constitute harassment provides no protection for privacy. First, the fact that conduct is "welcome" to its target does not make it "welcome" to those who overhear it or learn about it secondhand. *See Schwapp*, 118 F.3d at 111. Second, a complainant does not have to inform the accused that his behavior is "unwelcome" before filing a complaint and triggering the institution's duty to take "remedial action." Since hostile-environment regulations do not even require a complainant to provide fair warning to the accused, even when it would be easy to do so, they are not "narrowly tailored" to eliminating discrimination.

II. THIS COURT SHOULD CONSTRUE TITLE IX NARROWLY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS.

As we have explained above, interpreting Title IX to reach students' speech, as the Office for Civil Rights advocates, would raise serious constitutional questions. Ordinarily, an agency's interpretation of the statute it administers is entitled to deference by the courts so long as it does not conflict with a clearly expressed congressional intent and it is reasonable. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 574 (1988), *citing Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842--43 n.9 (1984). However, this rule has an important exception. No deference is owed the administrative agency when its interpretation would raise serious constitutional questions; to the contrary, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 574 (1988), *citing N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). Thus, OCR's interpretation should be rejected if a reasonable, more narrow interpretation of Title IX exists. This is true even if OCR's Policy Guidance regarding peer harassment would ordinarily be deemed an agency regulation to be given deference by the courts.

Unlike OCR, some civil rights agencies have wisely construed the rules of harassment liability so as to avoid potential constitutional conflicts. For example, the Illinois Human Rights Commission, citing First Amendment concerns, has held that a state civil rights law barring discrimination in public accommodations does not hold schools liable for "hostile learning environments." *Haney v. University of Illinois*, No. 1993SP0431, 1994 WL 880339. This Court should likewise construe Title IX so as to avoid potential constitutional problems.

III. SERIOUS CONSTITUTIONAL QUESTIONS CAN BE AVOIDED BY CONSTRUING TITLE IX AS MODELLED ON THE EQUAL PROTECTION CLAUSE, WHICH DOES NOT REACH STUDENT SPEECH OR CONDUCT.

A reasonable, narrower alternative to OCR's construction of Title IX exists. Title IX can be modelled on the Equal Protection Clause, which does not place a duty on educational institutions to regulate student interaction or prevent peer-on-peer harassment. Such an interpretation would be in keeping with this Court's construction of Title VI, on which Title IX is modelled. By contrast, OCR's broad interpretation of Title IX liability rests on Title VII analogies undermined by this Court's ruling in *Gebser v. Lago Vista Independent School District*, 118 S.Ct. 1989 (1998), that Title VII negligence and constructive-notice principles do not apply to Title IX claims. *Gebser*, 118 S.Ct. at 1995 (rejecting OCR's position that constructive notice suffices); *contra Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, *11 (9th Cir. 1998) (relying on OCR guidance rejected in *Gebser* to hold that "a district may have either actual or constructive notice of racial harassment"), *citing* 59 Fed. Reg. 11450.

Title IX "was modelled after Title VI of the Civil Rights Act of 1964." *Gebser*, 118 S.Ct. at 1997, *citing*

Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979). In construing Title VI, this Court has repeatedly looked to the standards applicable to state institutions under the Equal Protection Clause of the Fourteenth Amendment, rather than to Title VII. For example, institutions' Title VI liability for segregation "extends no further than the Fourteenth Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). Similarly, Title VI subjects public and private universities alike to the same standards for affirmative action plans that govern public universities under the Fourteenth Amendment, *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978)(Opinion of Powell, J., announcing the judgment of the Court); *id.* at 325 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.), rather than applying the very different standards governing affirmative action plans under Title VII. *Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979). Since Title IX closely parallels the Equal Protection Clause, liability for harassment of public and private institutions under Title IX should resemble public institutions' liability under the Equal Protection Clause.

Liability for harassment is very different under the Fourteenth Amendment than under Title VII. Under Title VII, an institution is liable for mere "negligence" towards harassment, *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2289 (1998)(courts have "uniformly judg[ed] employer liability. . .under a negligence standard"), and it is sufficient if the harasser -- rather than the institution or its agents -- is motivated by sex, *see Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998, 1002 (1998). It is only by overlooking the essential fact that an employer's liability under Title VII is based on negligence, not discriminatory intent, that courts have managed to recognize "peer harassment" claims under Title IX despite Title IX's re-

quirement of discriminatory intent by the institution. *See Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949, 958 (4th Cir. 1997)(erroneously asserting that peer-harassment liability holds "[a] defendant educational institution, like a defendant employer" "liable *for its own* discriminatory actions"), *reh'g en banc granted, opinion vacated*, Feb. 5, 1998; *Doe v. University of Illinois*, 138 F.3d 653, 662 (7th Cir. 1997)(erroneously asserting that "failure to take prompt, appropriate action" against accused harasser is "presumably, perhaps even necessarily, a manifestation of intentional sex discrimination"); *id.* at 669 (Coffey, J., dissenting)(criticizing court rulings creating peer harassment liability for confusing "negligence" with the "discriminatory intent" needed for damages under Title IX).

Unlike Title VII, the Fourteenth Amendment holds a state institution liable only for its own discrimination, e.g., discriminatory acts by its employees, *The Civil Rights Cases*, 109 U.S. 3 (1883), and "'erects no shield against merely private conduct, however discriminatory or wrongful.'" *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1962). A public institution is not liable for the discriminatory or wrongful acts of private parties, even when it is "deliberately indifferent" to their acts. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982); *see San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546 (1987)(Federal government's "'[m]ere approval of or acquiescence in'" entity's discriminatory conduct did not make it liable for the discrimination).

For example, a state agency which gave a scarce

liquor license to a discriminatory private club despite its open policy of racial discrimination was not liable under the Equal Protection Clause for the discrimination, even though the club was pervasively regulated by state licensors. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Similarly, even though the Federal government subsidized, chartered and extensively regulated the U.S. Olympic Committee, which could not even change its charter without complying with federal guidelines, the Committee's alleged discrimination did not violate equal protection. *San Francisco Arts & Athletics*, 483 U.S. at 546. Thus, it is not enough that a school's actions have the foreseeable effect of facilitating private discrimination or harassment. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)("'[d]iscriminatory purpose' implies more than intent as. . .awareness of consequences. - . .It implies that a decisionmaker selected or reaffirmed a particular course of action. . .'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

Since students are generally not state actors, public schools are not liable for student-on-student harassment under the Fourteenth Amendment (except in the exceedingly rare case that school officials harbored a discriminatory animus against the complainant on account of her sex). *E.g.*, *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1188 (11th Cir. 1996)(affirming dismissal of plaintiff's equal protection claim without discussion), *rev'd in part on other grounds*, 120 F.3d 1390 (11th Cir. 1997)(en banc), *cert. denied in relevant part, cert. granted in part*, 119 S.Ct. 29 (1998); *UWM Post v. Board of Regents*, 774 F.Supp. 1163, 1176 ("Since students are generally not state actors, the . . . Fourteenth Amendment equal protection argument is inapplicable to this case"); *Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 77 (D. N.H.

64, 77 (D. N.H. 1997) (same)(citing *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997), in which a deliberately indifferent response to domestic violence against a woman did not violate the Equal Protection Clause); Thomas Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 80 Ed. Law. Rep. 519, 533 (1996)("[e]very one of the courts confronted with a Fourteenth Amendment claim in addition to the Title IX cause of action dismissed the constitutional cause of action"). *See Rowinsky v. Bryan Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996)(discriminatory intent not shown by school's failure to remedy harassment by students, as opposed to its own agents; disparate treatment of male and female harassment complainants on account of their sex must be shown to establish Title IX liability), *cert. denied*, 117 S.Ct. 165 (1996).

Since the Equal Protection Clause requires a showing that a school official refused to discipline a student accused of harassment "'because of,' not merely 'in spite of,'" the complainant's sex, *Feeney, supra,* 442 U.S. at 279, if an official fails to respond to student-on-student harassment out of sloth, ineptitude, or -- in the case of verbal harassment -- a desire not to chill free speech, the official is not liable for the harassment under the Equal Protection Clause, since her purpose in failing to respond is not discriminatory. Many states have broader free speech guarantees than the federal constitution, *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980)(states may constitutionally extend their free speech guarantees to cover speech not protected by the federal law); *Pyle v. South Hadley School Committee*, 423 Mass. 283, 667 N.E.2d 869 (1996)(state law protected speech by high school students that was not protected under the federal First Amendment), and school officials are not acting out

of a discriminatory purpose when they honor these state guarantees in refusing to discipline students for "harassing" speech. *Corry v. Stanford, supra* (voiding harassment rule under California law, which applies broad free-speech guarantees to both college and high school students); *see Meltebeke v. B.O.L.I.*, 903 P.2d 351, 363 (Or. 1995)(state constitution protects unintentionally offensive religious speech that makes work environment hostile).

By contrast, the Equal Protection Clause does hold teachers liable for discriminatory harassment, since they are state actors.[7] *E.g.*, *Doe v. Taylor Independent School Dist.*, 975 F.2d 137, 138, 142-47 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993), *aff'd on other grounds*, 15 F.3d 443 (1994)(en banc), *cert. denied*, 513 U.S. 815 (1995). Moreover, under the Equal Protection Clause, as under this Court's construction of Title IX, an educational institution is liable for "deliberate indifference" in responding to harassment by teachers. *Compare Doe*, 975 F.2d at 138, 142-47 (Equal Protection Clause) *and Gebser*, 118 S.Ct. at 1999 (Title IX). This is because, in a

---

[7] This does not mean, of course, that the Fourteenth Amendment invariably trumps professors' First Amendment rights. Society has a compelling interest in promoting academic freedom, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312-15 (1978), and harassment regulations may have to be interpreted more narrowly and precisely when applied to professors' classroom speech in order not to chill academic freedom. *E.g.*, *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1290 (1997)(successful as-applied challenge to sexual harassment policy by professor on vagueness grounds); *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293, 314 (D.N.H. 1994)(same). *Cf. Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)("standards of permissible statutory vagueness are strict in the area of [academic freedom] . . . government may regulate in the area only with narrow specificity").

limited sense, state employees *are* the state, which lacks a corporeal existence of its own, and can only act through employees, such as teachers. *Cf. Yniguez v. Arizonans for Official English*, 69 F.3d 920, 960 (9th Cir. 1995) (Kozinski J., dissenting), *vacated*, *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997)("[g]overnment has no mouth, it has no hands or feet; it speaks and acts through people. Government employees must do what the state can't do for itself, because it lacks corporeal existence; in a real sense, they *are* the state"). Thus, the mere fact that school systems are deemed to intentionally discriminate when they are "deliberately indifferent" to teacher-student harassment under the Equal Protection Clause and Title IX does not mean that they "discriminate" when they are deliberately indifferent to student-on-student harassment.

While teachers are state actors, students are not, and only the grandest legal fiction would impute their discriminatory intent to the government merely because it fails to discipline them. For example, if Nazis periodically march through Skokie, thereby creating a hostile residential environment for Jews, the City is not liable for its "deliberate indifference" in failing to prevent the marches. *Cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). The reason is that while the Fourteenth Amendment requires the State to restrict the bigoted conduct of its employees, including teachers, it places no duty on the state to prevent such behavior by private parties, such as students. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)("careful adherence to the 'state action' requirement preserves an area of individual freedom"). Thus, public institutions are not liable under the Equal Protection Clause for failing to remedy harassment by students. And since the duties of public and private schools under Title IX are modelled on those

of public schools under the Equal Protection Clause, Title IX does not hold institutions liable for failing to remedy harassment by students, either.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

JAMES A. MOODY
1101 30th Street, Ste. 300
Washington, DC 20006
(202) 944-8600

Counsel for Amici Curiae
Students for Individual Liberty
and Student Association for
Freedom of Expression

December 1998